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IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

KHALED A.F. AL ODAH, NEXT FRIEND OF FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* CANADIAN PARLIAMENTARIANS AND PROFESSORS OF LAW IN SUPPORT OF REVERSAL

CRAIG FORCESE
FACULTY OF LAW
UNIVERSITY OF OTTAWA
57 Louis Pasteur Street
Ottawa, Ontario K1N 6N5
Canada

WILLIAM R. STEIN
Counsel of Record
SCOTT H. CHRISTENSEN
HUGHES HUBBARD & REED LLP
1775 I Street, N.W.
Washington, D.C. 20006
(202) 721-4600

Counsel for Amici Curiae Canadian Parliamentarians and Professors of Law

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. CUSTOMARY INTERNATIONAL LAW SHOULD INFORM THIS COURT'S DECISION ON THE CONSTITUTIONALITY OF THE MILITARY COMMISSIONS ACT UNDER THE SUSPENSION CLAUSE 4

A. The Application Of Constitutional Provisions To Non-Citizens Should Be Decided In The Context Of The United States' Obligations Under Customary International Law 5

B. U.S. Obligations Under Customary International Law Apply To Detainees At Guantánamo Bay 7

II. THE MILITARY COMMISSIONS ACT IS INCONSISTENT WITH U.S. OBLIGATIONS UNDER CUSTOMARY INTERNATIONAL LAW TO PROVIDE MINIMUM STANDARDS OF TREATMENT TO FOREIGN NATIONALS 10

A. The Minimum Standards Of Treatment Guarantee The Right To Independent

And Impartial Review Of The Basis For Detention 12

1. Minimum standards of treatment require that non-citizens have access to independent judicial review of the basis for arrest and detention 13

2. Minimum standards of treatment protect non-citizens against denials of justice 16

3. The Military Commissions Act violates these minimum standards of treatment 18

B. The MCA Violates Minimum Standards Of Treatment Guaranteeing Non-Discriminatory Treatment Of Non-Citizens With Respect To Core Civil Rights 21

1. Minimum standards of treatment bar discrimination based on national origin with respect to access to habeas-type relief 21

2. The Military Commissions Act violates the non-discrimination principle 23

C. U.S. Obligations Under Customary International Law Apply During Times Of Armed Conflict 24

CONCLUSION 26

TABLE OF AUTHORITIES

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Atkins v. Virginia, 536 U.S. 304 (2002) 4

EM Ltd. v. Republic of Argentina, 473 F.3d 463 (2d Cir. 2007) 10

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Zadvydas v. Davis, 533 U.S. 678 (2001) 16

U.S. STATUTES AND ADMINISTRATIVE MATERIALS

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Baban v. Australia, U.N. Hum. Rts. Comm., Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (2003) 15

Bakhtiyari v. Australia, U.N. Hum. Rts. Comm., Communication No. 1069/2002, U.N. Doc. CCPR/C/79/D/1069/2002 (2003) 14, 15

Bandajevsky v. Belarus, U.N. Hum. Rts. Comm., Communication No. 1100/2002, U.N. Doc. CCPR/C/86/D/1100/2002 (2006) 14, 15

C. v. Australia, U.N. Hum. Rts. Comm., Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002) 15

Carranza Alegre v. Peru, U.N. Hum. Rts. Comm., Communication No.1126/2002, U.N. Doc. CCPR/C/85/D/1126/200228 (Nov. 17, 2005) 14

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Mil. Comm'n R. Evid. 21

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Amici curiae support reversal of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in these consolidated cases. 476 F.3d 934 (D.C. Cir. 2006).[1]

INTEREST OF THE *AMICI CURIAE*

Amici are Canadian parliamentarians and Canadian professors of law with an interest in international and public law and, in many cases, expertise in the areas of public and international law implicated in these cases. Their names and affiliations are listed in the Appendix to this brief.

These cases raise matters of particular relevance to Canadian lawmakers and law professors. First, Canada is a staunch ally of the United States and has deployed soldiers in Afghanistan alongside U.S. troops. Canadian lawmakers and law professors have, therefore, a strong interest in an outcome in these cases that corresponds closely to existing doctrines of international law applied by Canada and other allied nations.

Second, one of the detainees affected by these cases, Omar Khadr, is a Canadian citizen who has been detained at Guantánamo Bay since 2002, following his capture by U.S. forces in Afghanistan. He has been charged with various offences and is in proceedings before the Military Commission. Canadian lawmakers and law professors have a strong interest in urging treatment of Canadian citizens that

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[1] All parties have consented to the filing of this brief. Counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part and that no person, other than *amici*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

meets internationally-recognized standards, not least those established in customary international law as described below.

Third, the international context of these cases imprints this Court's deliberations with precedential significance that extends beyond the United States. The United States' contribution to the rule of law and human rights has been exceptional and in many cases foundational. There are principles at stake in this appeal that transcend the interests of any Petitioner. How this Court construes the obligations of the United States in relation to the treatment and prosecution of alien detainees in an inchoate and potentially indefinite campaign against terrorism will affect how other nations understand their own, identical obligations in this campaign and in future conflicts. The interests of the United States and the global community are best served by an approach that hews closely to existing standards of customary international law. An approach inconsistent with doctrines of international law will generate uncertainty about the scope of international norms and could redound to the detriment of the United States and its allies (such as Canada) by encouraging similar practices by states antagonistic to the United States and its allies. In this arena, the interpretation of the U.S. legal principles at issue in these cases should, in the words of Justice Harry A. Blackmun, "be informed by a decent respect for the global opinions of mankind."[2]

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[2] Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 48 (1994) (referring specifically to the Eighth Amendment).

SUMMARY OF ARGUMENT

Petitioners in these cases are foreign nationals who have been detained indefinitely at a military facility controlled by the United States at Guantánamo Bay. The Military Commissions Act of 2006 ("MCA") denies non-citizens the right to petition an impartial and fair judiciary for a writ of habeas corpus.[3] This Court is asked to decide whether the MCA violates the Suspension Clause of the U.S. Constitution. The application of constitutional provisions to non-citizens should be decided in the context of the United States' obligations under customary international law. Those obligations apply to detainees at Guantánamo Bay because it is under exclusive and comprehensive U.S. control. As a result, customary international law should inform this Court's decision on the constitutionality of the MCA.

By restricting non-citizen detainees' meaningful access to any independent and impartial tribunal to challenge the basis for their confinement — *i.e.*, by prohibiting relief akin to habeas corpus — the MCA violates customary international law. In particular, the MCA fails to meet the minimum standards set by customary international rules on the treatment of aliens, including during times of armed conflict. The MCA falls far short of those minimum standards because it (1) deprives aliens of core protections afforded by customary international norms and (2) impermissibly discriminates between citizens and non-citizens by denying non-citizens internationally-recognized legal rights to which citizens and non-citizens are both entitled.

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[3] Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (2006).

ARGUMENT

I. CUSTOMARY INTERNATIONAL LAW SHOULD INFORM THIS COURT'S DECISION ON THE CONSTITUTIONALITY OF THE MILITARY COMMISSIONS ACT UNDER THE SUSPENSION CLAUSE

On numerous occasions, this Court has looked to international precedent and practice to inform its position on constitutional issues.[4] This Court's practice is consistent with other common law jurisdictions with written bills of rights.[5] It is also an important approach on issues that

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[4] *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (looking to international practice and treaties in interpreting the Eighth Amendment's application to the juvenile death penalty); *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (invoking the laws and practices of other countries, international treaties, and decisions of the European Court of Human Rights, in determining applicability of the Due Process Clause of the Fourteenth Amendment on state power to proscribe private sexual conduct between consenting adults); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved" in determining whether the practice transgresses the prohibition against cruel and unusual punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (contemplating world opinion and practice in determining whether the Constitution would permit execution of criminals under the age of 16).

[5] *See, e.g., R. v. Hape*, 2007 SCC 26 ¶¶ 55-56 (Can.) (in interpreting Canada's constitutionalized bill of rights, the *Canadian Charter of Rights and Freedoms*, the court signaled the need to "ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other" and held that in "interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction"); *Zaoui v Attorney-General (No 2)*,

implicate the interests of the international community.[6] These are not cases in which the Court is being asked to apply international law in its assessments of rights that touch exclusively on United States territory, persons, and interests. Rather, the subject matter of these cases concerns non-citizens who were captured outside the territories of the United States in a conflict governed by international law,[7] and who are detained at a military facility whose status is, in part, governed by an international agreement. In deciding whether the MCA violates the Suspension Clause, therefore, the Court should consider whether the United States' obligations to non-citizens under customary international law include the obligation to provide relief akin to habeas corpus to allow them to challenge their indefinite detention.

A. The Application Of Constitutional Provisions To Non-Citizens Should Be Decided In The Context Of The United States' Obligations Under Customary International Law

Not long after the right to petition for a writ of habeas corpus was enshrined in the U.S. Constitution, this Court recognized customary international law as part of U.S. law. The earliest cases interpreting the status of customary

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[2006] 1 N.Z.L.R. 289, ¶ 90 (N.Z.S.C.) (interpreting the New Zealand Bill of Rights in keeping with the International Covenant on Civil and Political Rights).

[6] *See R. v. Hape*, *supra* note 5, ¶ 33 (observing that, where the application of the *Charter* "implicates interstate relations, the tools that assist in the interpretation exercise include Canada's obligations under international law and the principle of the comity of nations").

[7] *See Hamdan v. Rumsfeld*, 548 U.S. ___, 126 S. Ct. 2749, 2795-98 (2006) (applying the Geneva Conventions, and specifically Common Article 3).

international law held that international law was part of U.S. law and binding on the actions of the government. The Court explained that it is generally "bound by the law of nations which is a part of the law of the land." *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *see The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination.").

To be sure, Congress may by statute supersede customary international law. Any such legislative enactment, of course, must be consistent with the Constitution. And, we submit, in examining whether legislation in derogation of customary international law violates a constitutional provision, the Court should apply the same rule of construction it applies to an act of Congress: the constitutional provision "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *see also The Paquete Habana*, 175 U.S. at 700 (courts must look to "customs and usages of civilized nations" in interpreting domestic law). This approach would be consistent with that adopted by other common law jurisdictions. *See, e.g., R. v. Hape*, 2007 SCC 26 ¶¶ 55-56 (Can.) (interpreting the *Canadian Charter of Rights and Freedoms* consistently with international law). Accordingly, in determining the application of the Suspension Clause to the detainees at Guantánamo, the Court should construe the clause so as to

effectuate, not violate, the United States' obligations under customary international law.

As we show below, customary international law requires the United States to afford aliens under its control a judicial remedy that is akin to habeas corpus. The Court, therefore, should construe the Suspension Clause to guarantee aliens under U.S. control at Guantánamo access to the Great Writ. The MCA, by purporting to foreclose access to that remedy, violates the Constitution as well as the standards of customary international law.

B. U.S. Obligations Under Customary International Law Apply To Detainees At Guantánamo Bay

The United States' obligations under customary international law apply to detainees at Guantánamo Bay.

First, the United States has accepted that, as a matter of international law, the military base at Guantánamo is territory for which it is internationally responsible. In 1978, President Carter transmitted to the Senate, for its advice and consent to ratification, Additional Protocol I to the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco). This protocol commits state parties to respect certain obligations on the deployment of nuclear weapons "in Latin America in territories for which, *de jure* or *de facto*, they are internationally responsible."[8]

The Secretary of State's accompanying report to the

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[8] Treaty for the Prohibition of Nuclear Weapons in Latin America, Additional Protocol I art. 1, *opened for signature* Feb. 14, 1967, 1968 U.N.T.S. 326.

President on the Protocol, also transmitted to the Senate, observed that:

> By adhering to Protocol I, the United States undertakes to apply [certain articles] of the Treaty to territories within the zone of application [of the Treaty] for which, *de jure* or *de facto*, the United States is internationally responsible (Article 1). The territories affected by our adherence to Protocol I will include Puerto Rico, the Virgin Islands, the Canal Zone (until entry into force of the Panama Canal Treaties), and *our military base at Guantánamo*.[9]

The Senate ratified Additional Protocol I in November 1981 without attaching any understandings material to the question of the United States' international responsibility for Guantánamo Bay.[10]

As the state *de jure* or *de facto* internationally responsible for the military base at Guantánamo, the United States bears unquestionable international responsibility for actions undertaken by its officials within that territory.[11] The

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[9] *Arms Control and Disarmament*, 1978 Digest § 7, at 1616 (quoting the accompanying report to the President from Secretary of State Cyrus R. Vance on Additional Protocol I, dated May 15, 1978) (emphasis added).

[10] 127 Cong. Rec. S27,419-21 (1981); S. Exec. Rep. No. 97-23 (1981); *see also* U.S. Dep't of State, *Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco)* (summarizing the Senate understandings and reiterating that "[t]he U.S. Protocol I territories include Puerto Rico, the U.S. Virgin Islands, and the naval base at Guantanamo Bay"), *available at* http://www.state.gov/t/ac/trt/4796.htm.

[11] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. &

substantive international law standards discussed below thus attach to U.S. conduct at Guantánamo Bay.

Second, the factual circumstances at Guantánamo Bay attract application of the international human rights obligations found in the International Covenant on Civil and Political Rights ("ICCPR").[12] As noted below, ICCPR rights apply also as customary standards of minimum treatment of aliens. By its own terms, the ICCPR requires the United States "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in" the treaty.[13] A state's "jurisdiction," of course, may extend beyond its sovereign territory and protect persons within the power and effective control of the state, even outside of that state's territory.[14]

Herz. v. Serb. & Mont.), General List No. 91, 2007 I.C.J. ___, ¶ 385 (Feb. 26) (describing the "well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State").

12 *Opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

13 ICCPR art. 2(1).

14 *See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 180 (July 9); U.N. Hum. Rts. Comm., *General Comment 31*, 59 U.N. GAOR Supp. (No. 40) ¶ 10, U.N. Doc. A/59/40 (2004); *Lopez Burgos v. Uruguay*, U.N. Hum. Rts. Comm., Communication No. 52/1979, ¶ 12.3, U. N. Doc. CCPR/C/13/D/52/1979 (1981) (noting that Article 2(1)'s references to jurisdiction and territory "does not imply that the State party concerned cannot be held accountable for the violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it").

The military base at Guantánamo lies within the "exclusive jurisdiction and control" of the United States. *Rasul v. Bush*, 542 U.S. 466, 476 (2004). Under the agreement between the United States and Cuba, "the United States shall exercise complete jurisdiction and control over and within" Guantánamo.[15] An executive order[16] and federal regulations[17] control access and egress from this territory.[18] Accordingly, in its activities at Guantánamo, the United States is required to adhere to its obligations under customary international law.

II. THE MILITARY COMMISSIONS ACT IS INCONSISTENT WITH U.S. OBLIGATIONS UNDER CUSTOMARY INTERNATIONAL LAW TO PROVIDE MINIMUM STANDARDS OF TREATMENT TO FOREIGN NATIONALS

For more than a century, customary international law has recognized that states must not treat aliens in a manner that violates international "minimum standards of treatment."[19] Minimum standards of treatment include basic

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[15] Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 16-23, 1903, T.S. No. 418.

[16] Exec. Order No. 8749, 6 Fed. Reg. 2252 (May 3, 1941).

[17] 32 C.F.R. pt. 761.

[18] For example, persons may only be admitted to the Guantánamo military base with the authorization of U.S. military officials. 32 C.F.R. §§ 761.8-761.19.

[19] *See, e.g.*, Restatement (Third) of Foreign Relations Law § 711 (1987) (discussing the nature and customary status of minimum treatment); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007) (citing Frank Griffith Dawson & Ivan L. Head, *International Law National Tribunals and the Rights of Aliens* 10 (1971) (describing the "International Minimum Standard of Justice"

substantive human rights, including a right to independent and impartial review of the basis for detention. Minimum standards of treatment also preclude a state from discriminating in the application of these rights on the basis of national origin. A detention system that denies the right to seek prompt habeas-type relief from a regularly-constituted court violates these standards of international law.

The doctrine of reciprocity underlies the minimum standards of treatment. Prior to the emergence of international human rights law following World War II, the two main sources of individual protection under international law were the laws of war (later "humanitarian law") and the rules of minimum treatment (defended through the doctrine of diplomatic protection). In both instances, while the right and the correlative duty reside in states, the benefit inures to individuals. Humanitarian law and the law of minimum treatment presuppose that all states share an equal interest in the fair treatment of their citizens at the hands of foreign states, whether during conflict or peace time. Inherent in a state's desire to ensure fair treatment of its own citizens by foreign states is the corresponding obligation to treat fairly aliens over whom it has power. As U.S. jurist and State Department attorney Edwin Borchard wrote in his seminal 1915 treatise on the diplomatic protection of citizens abroad:

> The views and the principles [the United States] has declared in the exercise of its right to protect American citizens abroad have, as a

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as "the standard of substantive and procedural treatment which aliens purportedly should receive in 'civilized' States and which they thus should receive abroad under international law")).

> general rule, been tempered by the knowledge that that it must recognize as belonging to aliens within this country the same rights that it seeks to establish for its citizens abroad, the measure of its obligations being the measure of its rights.[20]

Borchard's observation remains timely almost a century later.

A. The Minimum Standards Of Treatment Guarantee The Right To Independent And Impartial Review Of The Basis For Detention

Minimum treatment standards include important substantive guarantees. Thus, the United States, like all states,

> is responsible under international law for injury to a national of another state caused by an official act or omission that violates (a) a human right that . . . a state is obligated to respect for all persons subject to its authority; [or] (b) a personal right that, under international law, a state is obligated to respect for individuals of foreign nationality.[21]

This doctrine of minimum treatment predates international human rights law.[22] The latter now incorporates protections once guaranteed exclusively by the minimum treatment standards, but does so without diminishing the content of customary minimum treatment.

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[20] Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad, or the Law of International Claims*, at viii (1915).

[21] Restatement (Third) of Foreign Relations Law § 711.

[22] § 711 reporters' note 2.

For this reason, the substantive customary minimum treatment standard is transgressed where a state violates "those rights which the state is obligated to respect for all persons subject to its authority, whether pursuant to international human rights agreements to which it is party or under the customary law of human rights."[23] Specifically, a

> state's responsibility to individuals of foreign nationality under customary law includes the obligation to respect the civil and political rights articulated in the principal international human rights instruments — the Universal Declaration and the *International Covenant on Civil and Political Rights* — as rights of human beings generally . . ., but not political rights that are recognized as human rights only in relation to a person's country of citizenship, such as the right to vote and hold office, or the right to return to one's country.[24]

In this manner, most of the rights guaranteed in the ICCPR are a material component of customary minimum treatment standards and are properly at issue in these cases.

1. Minimum standards of treatment require that non-citizens have access to independent judicial review of the basis for arrest and detention

The provision of the ICCPR most material to these cases, Article 9(4), provides that: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may

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[23] § 711 cmt. b.

[24] § 711 cmt. c (emphasis added).

decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[25] This provision was inspired by the common law writ of habeas corpus,[26] and is designed to relieve persons of arbitrary detentions in violation of Article 9(1).[27]

Compliance with Article 9(4) requires "review of the substantive justification of detention."[28] This review must "include the possibility of ordering release" where the detention is arbitrary or otherwise violates the ICCPR and must not be limited to a review of "mere formal compliance of the detention with domestic law governing the detention."[29]

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25 ICCPR art. 9(4).

26 Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* 330 (2d ed. 2004). Article 9(4) acts to preserve a remedy akin to habeas corpus. For instance, the U.N. Human Rights Committee has held that a law that restricted the possibility of seeking habeas corpus relief with respect to persons under investigation, in that case for the offence of terrorism, violated Article 9(4). *Carranza Alegre v. Peru*, U.N. Hum. Rts. Comm., Communication No. 1126/2002, ¶¶ 3.3, 7.3, U.N. Doc. CCPR/C/85/D/1126/2002 (2005); *see also Bandajevsky v. Belarus*, U.N. Hum. Rts. Comm., Communication No. 1100/2002, ¶¶ 10.3-10.4, U.N. Doc. CCPR/C/86/D/1100/2002 (2006) (Article 9(4) violated where an individual was arrested pursuant to a law that did not allow a challenge to that detention before a court).

27 Article 9(1) reads: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

28 *Bakhtiyari v. Australia*, U.N. Hum. Rts. Comm., Communication No. 1069/2002, ¶ 9.5, U.N. Doc. CCPR/C/79/D/1069/2002 (2003).

29 *Shafiq v. Australia*, U.N. Hum. Rts. Comm., Communication No. 1324/2004, ¶ 7.4, U.N. Doc. CCPR/C/88/D/1324/2004 (2006); *see*

The review also must be by a "court," even in cases involving military detentions.[30] The ICCPR guarantees that any tribunal determining a criminal charge or any "rights and obligations in a suit at law" must be "competent, independent and impartial."[31] A determination of a habeas corpus right before a court is a suit at law determining a right; this judicial body must, therefore, be "competent, independent and impartial."[32]

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also A v. Australia, U.N. Hum. Rts. Comm., Communication No. 560/1993, ¶ 9.5, U.N. Doc. CCPR/C/59/D/560/1993 (1997) ("While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful,' article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant."); *Bakhtiyari v. Australia*, *supra* note 28, at ¶ 9.4 (concluding that Article 9(4) was violated where the prolonged detention of a non-citizen in immigration matters depended entirely on a determination of whether that person was an alien with proper papers and there was "no discretion for a domestic court to review the justification of her detention in substantive terms"); *Baban v. Australia*, U.N. Hum. Rts. Comm., Communication No. 1014/2001, ¶ 7.2, U.N. Doc. CCPR/C/78/D/1014/2001 (2003) (same); *C. v. Australia*, U.N. Hum. Rts. Comm., Communication No. 900/1999, ¶ 8.3, U.N. Doc. CCPR/C/76/D/900/1999 (2002) (same).

30 *See Vuolanne v. Finland*, U.N. Hum. Rts. Comm., Communication No. 265/1987, ¶ 9.6, U.N. Doc. CCPR/C/35/D/265/1987 (1989).

31 ICCPR art. 14(1).

32 *See Bandajevsky v. Belarus*, *supra* note 26, at ¶¶ 10.3-10.4 (concluding that Art. 9(4) was violated where there was no possibility of challenging the lawfulness of a detention before a court and noting, in a discussion incorporated into its conclusion on Art. 9(4), that "it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with"); *Rameka v. New*

The habeas-type relief must be timely. Citing international instruments[33] and pointing to this Court's decisions,[34] the Supreme Court of Canada recently ruled that denying a detained suspected terrorist access to the courts for a period of 120 days violated Canada's constitutional right to habeas corpus and the bar on arbitrary detention.[35] The United Nations Human Rights Commission has underscored that detainees at Guantánamo are entitled under Article 9 "to proceedings before a court to decide *without delay*" the legality of the detention.[36]

2. Minimum standards of treatment protect non-citizens against denials of justice

A state may prosecute a non-citizen for crimes committed in circumstances where it has jurisdiction over the crime and the accused. In so doing, however, the state

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Zealand, U.N. Hum. Rts. Comm., Communication No. 1090/2002, ¶ 7.4, U.N. Doc. CCPR/C/79/D/1090/2002 (2003) (suggesting that Art. 9(4) would have been violated in a parole release context if the parole board had been "insufficiently independent, impartial or deficient in procedure for these purposes").

33 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 221.

34 *Rasul*, 542 U.S. 466; *Zadvydas v. Davis*, 533 U.S. 678 (2001).

35 *Charkaoui v. Canada*, 2007 SCC 9, ¶¶ 90-94 (Can.).

36 U.N. Hum. Rts. Comm., *Concluding Observations: United States*, advance unedited version, ¶ 18, 87th Sess. (July 10-28, 2006), *available at* http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf (emphasis added).

must not violate customary minimum treatment standards by engaging in a "denial of justice."[37]

The concept of "denial of justice" in customary international law is defined as an injury "consisting of, or resulting from, denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civil."[38] By the beginning of the last century, it was established that:

> Undoubtedly the absence of any impartial tribunal from which justice may be sought, the arbitrary control of the courts by the government, the inability or unwillingness of the courts to entertain and adjudicate upon the grievances of a foreigner, or the use of the courts as instruments to oppress foreigners and deprive them of their just rights may each and all be regarded as equivalent to a denial of justice.[39]

By the end of the last century, it was established that a state is responsible

> if it fails to provide to an alien remedies for injury to person or property, whether inflicted

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37 *See, e.g., United States v. Romano*, 706 F.2d 370, 375 (2d Cir. 1983) ("In the absence of a denial of justice, as that concept is understood in public international law, no principle of international law is violated by a state which prosecutes and punishes an alien for a crime committed in its own territory.").

38 Restatement (Third) of Foreign Relations Law § 711 cmt. a; *see also Romano*, 706 F.2d at 375 ("In international law an alien may assert a denial of justice only upon a demonstration of grave or serious defects, such as a refusal to grant rights reasonably to be expected by an accused in a criminal trial.").

39 Borchard, *supra* note 20, at 335-36 (footnotes omitted).

> by the state or by private persons in circumstances in which a remedy would be provided by the *major legal systems of the world*. That such remedy might not be available because under domestic law the state or an official is immune from suit does not diminish the state's responsibility under international law.[40]

It is indisputable that the major legal systems of the world recognize a right to habeas corpus or similar relief.[41]

3. The Military Commissions Act violates these minimum standards of treatment

By denying non-citizens a right to habeas corpus relief before the regularly-constituted courts of the United States,[42] the MCA violates the standard of minimum

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[40] Restatement (Third) of Foreign Relations Law § 711 cmt. e (emphasis added).

[41] The writ of habeas corpus features in the legal systems of common law countries. *See, e.g.*, David Clark & Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (2000) (examining the habeas writ in the states of the British Empire and Commonwealth). Under different names, it is also found in civil law jurisdictions. *See, e.g.*, *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Advisory Opinion, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8, ¶¶ 32-43 (Jan. 30, 1987), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_08_ing.pdf (noting the prevalence of the habeas-like remedy of "amparo" and habeas itself in Latin America and discussing the habeas protections in the American Convention on Human Rights); *see also* European Convention, *supra* note 33, art. Art 5(4) (guaranteeing a habeas right in the 46 European state parties to that instrument).

[42] *See* MCA § 3(a), 120 Stat. at 2623-24 (codified at 10 U.S.C. § 950j(b)) ("[N]o court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under

treatment under customary international law expressed in human rights law and captured in the concept of denial of justice. Indeed, the Supreme Court has previously recognized that the deprivation of full and complete access to the courts is a form of punishment.[43] This is precisely what the MCA does by limiting detainees' access to the courts for habeas corpus petitions.

The MCA regime's reliance on the Combatant Status Review Tribunal ("CSRT") is no substitute for habeas corpus relief because it does not meet the competent, impartial and independent tribunal standard required under international law. These tribunals are not independent of the executive. As Petitioners and other *amici* set forth in greater detail, the form of appellate review in the D.C. Circuit limits the grounds of review available to Petitioners and is too cramped to overcome the infirmities of the CSRT.[44] These limitations would not exist on habeas corpus review.

Because the habeas-stripping provisions of the MCA also purport to remove habeas authority over Military

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this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter."); § 7(a), 120 Stat. at 2636 (codified at 28 U.S.C. § 2241(e)(1)) ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.").

[43] *Pierce v. Carskadon*, 83 U.S. 234, 237-39 (1872) (holding that a West Virginia law limiting access to the courts for former Confederate sympathizers was an unlawful attainder).

[44] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C), 119 Stat. 2680, 2742 (scope of review for CSRT determinations).

Commissions, the consequence of upholding the MCA would be to permit criminal trial and punishment — including the death penalty — of detainees by the executive, without meaningful recourse to a competent, impartial, and independent tribunal as required by international law. The D.C. Circuit's scope of appellate review of military commission decisions is circumscribed in exactly the same manner as its review of CSRT determinations.[45] Thus, contrary to this Court's ruling in *Hamdan v. Rumsfeld*,[46] detainees would not be able to raise pre-trial challenges before an independent tribunal on such fundamental questions as whether the commission has subject matter jurisdiction over offenses defined *ex post facto,* such as conspiracy;[47] whether evidence obtained through coercion is admissible;[48] or whether hearsay evidence may be used to secure a conviction resulting in the death penalty.[49]

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[45] *Compare* MCA § 3, 120 Stat. at 2622 (codified at 10 U.S.C. § 950g(c)) (scope of review for military commissions) *with* Detainee Treatment Act § 1005(e)(2)(C), 119 Stat. at 2742.

[46] *See* 126 S. Ct. at 2788 (finding it "appropriate" to review military commission procedures prior to a final decision).

[47] *See* MCA § 3, 120 Stat. at 2630 (codified at 10 U.S.C. § 950v(b)(28)) (defining conspiracy as a crime triable by military commission).

[48] *See* MCA § 3(a), 120 Stat. at 2607 (codified at 10 U.S.C. § 948r(c), (d)) (permitting the admission of a statement obtained by coercion so long as the military judge deems the statement reliable, the interests of justice would be served by its admission, and, for those statements obtained after the enactment of the Detainee Treatment Act, the methods used do not qualify as "cruel, inhuman, or degrading treatment" under that Act).

[49] *See* MCA § 3(a), 120 Stat. at 2608-09 (codified at 10 U.S.C. § 949a) (providing the Secretary of Defense with wide latitude to establish pretrial, trial and post-trial procedures, including the admission of

B. The MCA Violates Minimum Standards Of Treatment Guaranteeing Non-Discriminatory Treatment Of Non-Citizens With Respect To Core Civil Rights

Minimum standards of treatment under customary international law also indisputably incorporate non-discrimination obligations, which bar treatment of non-citizens in certain ways that fall below the treatment for citizens. The MCA violates the principle of non-discrimination.

1. Minimum standards of treatment bar discrimination based on national origin with respect to access to habeas-type relief

The minimum treatment standards preclude discriminatory treatment that favors citizens over non-citizens:

> Internationally recognized human rights generally apply to aliens as to nationals. . . . Discrimination against aliens in matters that are not themselves human rights may nonetheless constitute a denial to the individual of the equal protection of the laws.[50]

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hearsay evidence); Mil. Comm'n R. Evid. § 304(g)(1) ("An oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for.").

[50] Restatement (Third) of Foreign Relations Law § 711 cmt. f; *see also West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 832 (9th Cir. 1987) (noting. in a case concerning an alleged taking by Mexico of foreign-owned property that "[i]nternational law requires that aliens

While this limitation on discriminatory treatment does not apply to all civil and political rights,[51] it does preclude denials of justice reflecting discrimination between citizens and non-citizens: "It is a wrong under international law for a state to deny a foreign national access to domestic courts. . . . That is the central meaning of 'denial of justice.'"[52]

Under the minimum treatment standard, non-citizens enjoy basic human rights "equally with the state's own nationals."[53] Indeed, by its own terms, the ICCPR emphatically prohibits discriminatory application of rights between nationals and non-nationals. In Article 2, it requires "[e]ach State Party to the present Covenant . . . to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . *national or social origin*."[54]

As noted, this requirement of non-discrimination on the basis of national origin is relaxed for certain political rights that are reserved for "citizens."[55] And, of course, "aliens" may be expelled from national territories.[56] Discrimination on the basis of nationality, however, is

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not be discriminated against or singled out for regulation by the state").

51 For example, see those listed in Restatement (Third) of Foreign Relations Law § 711 reporters' note 2(C).

52 § 711 reporters' note 2(B).

53 § 711 cmt. b.

54 ICCPR art. 2(1) (emphasis added).

55 *See id.* art. 25.

56 *See id.* art. 13.

impermissible in relation to core legal rights. Thus, the habeas-type protections in Article 9 of the ICCPR apply to "anyone." Article 26 confirms that:

> *All persons* are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . *national or social origin*.[57]

Article 14 underscores that:

> *All persons* shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, *everyone* shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[58]

2. The Military Commissions Act violates the non-discrimination principle

The MCA eliminates the availability of habeas relief in the federal courts for *alien* enemy combatants alone.[59] Indeed, the entire military commissions system established by the MCA applies exclusively to "alien unlawful enemy combatant[s]."[60] Alien unlawful enemy combatants are persons who are not citizens of the United States and who

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[57] *Id.* art. 26 (emphasis added).

[58] *Id.* art. 14(1) (emphasis added).

[59] 28 U.S.C. § 2241 (effective Oct. 17, 2006).

[60] 10 U.S.C. § 948c.

(1) have engaged in or "purposefully and materially supported hostilities against the United States or its co-belligerents" but are not lawful enemy combatants or (2) have "been determined to be [] unlawful enemy combatant[s]" by the CSRT.[61] The CSRT is itself constituted to determine the status only of foreign nationals detained at Guantánamo Bay naval base.[62]

U.S. citizens who in all respects other than their nationality meet the definition of unlawful enemy combatants are subject to a very different legal system. Citizens charged with crimes identical to those faced by non-citizens detained at Guantánamo Bay are subject to the jurisdiction of civilian courts or courts-martial, where they are afforded full procedural due process protections, including the right to habeas corpus. The rights protected by the standards of minimum treatment in customary international law (including those expressed in the ICCPR) are not enjoyed equally by aliens and U.S. citizens in a system that extends greater rights to similarly-situated citizens than to non-citizens.

C. U.S. Obligations Under Customary International Law Apply During Times Of Armed Conflict

That some Guantánamo prisoners have been seized in a situation of armed conflict is irrelevant to this analysis. First, both non-citizens and U.S. citizens have been detained

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[61] § 948a(1), (3).

[62] Paul Wolfowitz, Deputy Secretary of Defense, Memorandum for the Secretary of the Navy re: Order Establishing Combatant Status Review Tribunal (July 7, 2004).

by the United States as combatants, yet U.S. citizens are not subject to the habeas repeal or to the military commissions process. The fact of alienage neither exacerbates nor distinguishes the alleged culpability of alien combatants in relation to citizen combatants. Second, in a situation of armed conflict, international humanitarian law is the *lex specialis* — that is, a specialized body of law that applies in lieu of conflicting, general rules. An armed conflict, however, displaces more general rules of international law only where a principle of international humanitarian law is irreconcilably inconsistent with the regular law.[63]

There is no principle of international humanitarian law that would be offended by the application of minimum treatment in these cases. Nor is there any practical objection to the habeas relief these rules of minimum treatment require. Petitioners are not being held in exigent circumstances in battlefield conditions. On the contrary, they are far removed from any theater of conflict and have been held in the clear and uninterrupted custody of the United States for as long as six years during an inchoate and potentially interminable campaign against terrorism. In these unique and unprecedented circumstances, there is no persuasive, practical objection to Petitioners being provided

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[63] *See Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 358, U.N. Doc. A/56/10 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (discussing the application of the doctrine of *lex specialis*, and noting: "For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.").

full recourse to the courts of the United States by way of a writ of habeas corpus.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

CRAIG FORCESE
FACULTY OF LAW
UNIVERSITY OF OTTAWA
57 Louis Pasteur Street
Ottawa, Ontario K1N 6N5
CANADA

WILLIAM R. STEIN
Counsel of Record
SCOTT H. CHRISTENSEN
HUGHES HUBBARD & REED LLP
1775 I Street, N.W.
Washington, D.C. 20006
Telephone: (202) 721-4600

Counsel for Amici Curiae Canadian Parliamentarians and Professors of Law

Dated: August 23, 2007

APPENDIX

APPENDIX

PARLIAMENTARIANS

Omar Alghabra, MP, Mississauga-Erindale

Hon. Warren Allmand, PC, QC, Former MP and Former Solicitor General of Canada.

Alex Atamanenko, MP, BC Southern Interior

Hon. Larry Bagnell, PC, MP, Yukon, Former Parliamentary Secretary to the Minister of Natural Resources

Senator Tommy Banks, Alberta

Hon. Sue Barnes, PC, MP, London West, Former Parliamentary Secretary to the Minister of Justice and Attorney General of Canada

Dawn Black, MP, New Westminster-Coquitlam

Hon. Ed Broadbent, PC, Former MP, Ottawa-Centre

Olivia Chow, MP, Trinity-Spadina

Joe Comartin, MP, Windsor-Tecumseh

Hon. Irwin Cotler, PC, MP, Mount Royal, Former Minister of Justice and Attorney General of Canada, Opposition Critic for Human Rights

Hon. Hedy Fry, PC, MP, Vancouver Centre, Former Parliamentary Secretary to the Minister of Citizenship and Immigration

Hon. John Godfrey, PC, MP, Don Valley West, Former Parliamentary Secretary to the Prime Minister (Cities)

Yvon Godin, MP, Acadie-Bathurst

Hon. Marlene Jennings, PC, MP, Notre-Dame-de-Grâce – Lachine, Former Parliamentary Secretary to the Prime Minister (Canada-U.S.)

Hon. Jack Layton, PC, MP Toronto-Danforth, Leader of the New Democratic Party

Hon. Flora MacDonald, PC, Former MP, Former Minister of Foreign Affairs

Hon. Diane Marleau, PC, MP, Sudbury, Former Minister for International Cooperation

Tony Martin, MP, Sault Ste. Marie and Algoma

Irene Mathyssen, MP, London-Fanshawe

Hon. John McCallum, PC, MP, Markham-Unionville, Former Minister of National Defence

Alexa McDonough, MP, Halifax, NDP Foreign Affairs and International Development Critic

Hon. Dan McTeague, PC, MP, Pickering-Scarborough East, Official Opposition Critic for Foreign Affairs (Consular Services), Former Parliamentary Secretary to the Minister of Foreign Affairs

Hon. Maria Minna, PC, MP, Beaches-East York, Former Minister for International Cooperation

Peggy Nash, MP, Parkdale-High Park

Senator Vivienne Poy, Ontario

Hon. Geoff Regan, PC, MP, Halifax West, Former Minister of Fisheries and Oceans

Hon. Lucienne Robillard, PC, MP, Westmount-Ville-Marie, Former Minister of Citizenship and Immigration

Hon. Allan Rock, QC, PC, Former MP, Former Minister of Justice and Attorney General of Canada and Former Ambassador to the United Nations for Canada

Bill Siksay, MP, Burnaby-Douglas

Lloyd St. Amand, MP, Brant

PROFESSORS OF LAW

Professor Sharryn J. Aiken, Faculty of Law, Queen's University

Professor Amir Attaran, Faculty of Law, University of Ottawa

Adjunct Professor David Baker, Faculty of Law, University of Toronto

Professor Benjamin L. Berger, Faculty of Law, University of Victoria

Professor Vaughan Black, Dalhousie Law School, Dalhousie University

Professor W.A. Bogart, Faculty of Law, University of Windsor

Professor Kristen Boon, Seton Hall Law School

Professor Jutta Brunnée, Faculty of Law, University of Toronto

Professor Michael Byers, Canada Research Chair in Global Politics and International Law, UBC Department of Political Science

Professor Emily F. Carasco, Faculty of Law, University of Windsor

Professor Sujit Choudhry, Scholl Chair, Faculty of Law, University of Toronto

Professor Arthur Cockfield, Associate Dean, Queen's University Faculty of Law

Professor François Crépeau, Canada Research Chair in International Migration Law, Centre for International Studies (CÉRIUM) , Faculty of Law, University of Montreal

Professor John Currie, Faculty of Law, University of Ottawa

Professor Catherine Dauvergne, Canada Research Chair in Migration Law, Associate Dean of Graduate Studies and Research, UBC Faculty of Law

Professor Richard F. Devlin, Associate Dean Graduate Studies and Research, Dalhousie Law School, University Research Professor, Dalhousie University

Professor Aaron A. Dhir, Osgoode Hall Law School, York University

Professor Bernard M. Dickens, Professor Emeritus, Faculty of Law, University of Toronto

Professor David Dyzenhaus, Faculty of Law, University of Toronto

Professor Craig Forcese, Faculty of Law, University of Ottawa

Professor Evan Fox-Decent, Faculty of Law, McGill University

Professor M. Michelle Gallant, Associate Dean, Faculty of Law, University of Manitoba

Professor Donald Galloway, Faculty of Law, University of Victoria

Professor Noemi Gal-Or, Director, Institute for Transborder Studies (ITS) , Department of Political Science, Kwantlen University College

Adjunct Professor Jason Gratl, UBC Faculty of Law, President, BC Civil Liberties Association

Professor Rebecca Johnson, Faculty of Law, University of Victoria

Professor Nicole LaViolette, Faculty of Law, University of Ottawa

Professor Yves Le Bouthillier, Faculty of Law, University of Ottawa

Professor Sébastien Lebel-Grenier, Vice-Dean, Research and Graduate Studies, Director of the Common Law and Transnational Law Program, Sherbrooke University

Professor Peter Leuprecht, Director of the Montreal Institute of International Studies, Université de Québec à Montréal

Professor Glen Luther, College of Law, University of Saskatchewan

Professor Michael Lynk, Faculty of Law, University of Western Ontario

Professor Audrey Macklin, Faculty of Law, University of Toronto

Professor Ravi Malhotra, Faculty of Law, University of Ottawa

Professor Moira L. McConnell, Dalhousie Law School, Dalhousie University

Professor Maeve McMahon, Department of Law, Carleton University

Professor Catherine Morris, Institute for Dispute Resolution and Faculty of Law, University of Victoria

Professor Bradford W. Morse, Faculty of Law, University of Ottawa

Professor Val Napoleon, Faculty of Law and Faculty of Native Studies, University of Alberta

Professor Martha O'Brien, Faculty of Law, University of Victoria

Professor Obiora Chinedu Okafor, Osgoode Hall Law School, York University

Adjunct Professor Grace Pastine, UBC Faculty of Law, Litigation Director, BC Civil Liberties Association

Professor Jim Phillips, Faculty of Law, University of Toronto

Professor René Provost, Faculty of Law, McGill University

Professor Tim Quigley, College of Law, University of Saskatchewan

Professor Linda C. Reif, CN Professor of International Trade, Faculty of Law, University of Alberta

Professor Kent Roach, Faculty of Law, University of Toronto

Adjunct Professor Darryl Robinson, Faculty of Law, University of Toronto

Professor Teresa Scassa, Faculty of Law, University of Ottawa

Professor Martha Shaffer, Faculty of Law, University of Toronto

Professor Peter Showler, Director, The Refugee Forum, Human Rights Research and Education Centre, University of Ottawa

Professor Penelope Simons, Faculty of Law, University of Ottawa

Professor Don R. Sommerfeldt, Sessional Instructor, Faculty of Law, University of Alberta

Professor Lorne Sossin, Faculty of Law, University of Toronto

Professor Joanne St. Lewis, Faculty of Law, University of Ottawa

Professor David M. Tanovich, Faculty of Law, University of Windsor

Professor William Tetley, McGill Law Faculty, Former Minister of Financial Institutions, Government of Quebec

Professor Barbara von Tigerstrom, College of Law, University of Saskatchewan

Professor Sheila Wildeman, Dalhousie Law School, Dalhousie University

Professor Stepan Wood, Osgoode Hall Law School, York University

Professor Jacob Ziegel, Faculty of Law, University of Toronto